82-616

No.

Office - Supreme Court, U.S.
FILED
OCT 6 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, *et al.*,
Petitioners,

vs.

SHIRLEY STOVER,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PATRICK MCLARNEY
(Counsel of Record)
DAVID R. MORRIS
ELWOOD L. THOMAS
ANDREW SEE
JOHN F. MURPHY
TIMOTHY J. KENNEDY
SHOOK, HARDY & BACON
20th Floor, Mercantile Tower
1101 Walnut Street
Kansas City, Missouri 64106
816/474-6550

JOHN E. SHAMBERG
LYNN R. JOHNSON
SCHNIDER, SHAMBERG & MAY
Merriam Oaks Building
8500 West 63rd, Suite 210
Shawnee Mission, Kansas 66204
913/384-0100

[Additional List of Counsel on Inside Cover]

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8030

MAX W. FOUST
MORRIS & FOUST
2390 City Center Square
12th and Baltimore
P. O. Box 26490
Kansas City, Missouri 64196
816/474-6050

DUKE W. PONICK, JR.
1850 City Center Square
1100 Main Street
P. O. Box 26035
Kansas City, Missouri 64196
816/221-5228

Attorneys for Petitioners
Melanie Hanson Johnson and
Gerard Stanley Johnson, et al.

QUESTIONS PRESENTED

1. Did the District Court's Order of January 25, 1982, improperly certify a mandatory class action under Federal Rule of Civil Procedure 23(b)(1)(A) to determine liability for compensatory and punitive damages arising out of a mass accident when the only risk of inconsistent adjudications is that defendants may be found liable to some plaintiffs but not to others?

2. Is the District Court's conclusion that there is a question whether sufficient funds are available to pay awards of punitive damages an improper basis for its Order of January 25, 1982, certifying a mandatory class action to determine liability for and amount of punitive damages arising from a mass accident under Federal Rule of Civil Procedure 23(b)(1)(B)?

3. When Missouri law allows multiple awards of punitive damages and does not permit a lump sum award to a class, did the District Court's Order of January 25, 1982, improperly certify a mandatory class action under Federal Rule of Civil Procedure 23(b)(1)(B) to determine liability for and amount of punitive damages?

4. When a class-wide award of punitive damages cannot constitutionally be divided among class members, did the District Court's Order of January 25, 1982, improperly certify a mandatory class action under Federal Rule of Civil Procedure 23(b)(1)(B) to determine liability for and amount of punitive damages?

5. Did the District Court deny petitioners Johnson, *et al.*, due process of law by preventing them from conducting discovery and presenting evidence on plaintiff Stover's adequacy as a class representative and ordering the Clerk of the Court to reject any matters petitioners or other class members might attempt to file?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover;*+ The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri;+ Jacqueline N. Rau;* Melanie Hanson Johnson, Gerard Stanley Johnson, and other state and federal court plaintiffs;+ Crown Center Redevelopment Corporation;*+ Hallmark Cards, Inc.;*+ Hyatt Corporation;*+ and Hyatt Hotels Corporation.*+

The Plaintiffs' Liaison Committee appointed by the state court participated as *amicus curiae*.

---

* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

\+ Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

TABLE OF CONTENTS

QUESTIONS PRESENTED I
LIST OF PARTIES II
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
JURISDICTION 2
STATUTES AND RULES INVOLVED 2
STATEMENT 2
REASONS FOR GRANTING THE PETITION 8

ARGUMENT—

I. The District Court's Certification of a Rule 23(b)(1)(A) Class on the Issue of Liability for Compensatory and Punitive Damages Is Improper 10

A. Rule 23(b)(1)(A) Does Not Apply to Tort Actions for Compensatory and Punitive Damages Where There Is No Risk of Exposing Defendants to Conflicting and Mutually Incompatible Standards of Conduct 10

B. The District Court's Certification of a Rule 23(b)(1)(A) Class for Compensatory and Punitive Liability Is Improper 11

II. The District Court's Certification of a Rule 23(b)(1)(B) Class on the Issues of Liability for and the Amount of Punitive Damages Is Without Justification and Is a Misapplication of Rule 23(b)(1)(B) 12

A. The Mere Possibility of a Limited Fund for Punitive Damages Is Not Sufficient to Invoke the Provisions of Rule 23(b)(1)(B) 13

B. Missouri Law Permits Multiple Awards of Punitive Damages for a Single Wrongful Act or Course of Conduct 14

C. Missouri Law Does Not Permit the Award of Punitive Damages As a Lump Sum in Favor of a Class 14

D. A Class-Wide Award of Punitive Damages Cannot Constitutionally Be Divided Among Class Members 15

1. Rule 23 Does Not Permit "Fluid Recovery" 16

2. Division of a Class-Wide Lump Sum Punitive Damages Award Would Violate Each Claimant's Constitutional Right to a Trial by Jury 17

III. The District Court's Orders of January 25 and 29, 1982, Are a Violation of the Rights of Class Members to Due Process of Law Under the Fifth Amendment to the United States Constitution in That They Preclude Class Members From Being Heard on the Propriety of the Class Proceeding 18

A. The District Court's *Ex Parte* Proceedings and Its Orders Deny Petitioners the Opportunity to Be Heard on Fundamental Class Action Issues 18

B. The Court Denied Petitioners Due Process by Denying Them the Opportunity to Be Heard After Its Order Certifying the Class 20

C. The Court Denied Petitioners Due Process by Its Inadequate and Improper Findings of Fact on Fundamental Class Action Issues 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Beggs v. Universal C.I.T. Credit Corporation, 409 S.W.2d 719, 724-25[8-13] (Mo. 1966) 14

Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. (1970) 15

Bukovac v. Lloyd Ketcham Oldsmobile, Inc., 579 S.W. 2d 790 (Mo. App., W.D. 1979) 15

Chmieleski v. City Products Corp., 71 F.R.D. 118 (W.D. Mo. 1976) 11

Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543, *cert. dismissed*, 443 U.S. 913 (1979) 13

Eisen v. Carlisle and Jacquelin, 479 F.2d 1005 (2d Cir. 1972), *vacated with instruction to dismiss class as defined*, 417 U.S. 156 (1974) 16

Esler v. Northrup Corp., 86 F.R.D. 20 (W.D. Mo. 1979) 11, 13

George v. United Savings & Loan Association, 63 F.R.D. 631 (N.D. Ga. 1974) 13

Goldberg v. Kelly, 397 U.S. 254, 271 (1970) 20

Grannis v. Ordean, 234 U.S. 285, 394 1914) 18

Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) 11

Holcroft v. Missouri-Kansas-Texas Railway Co., 607 S.W.2d 158 (Mo. App., W.D. 1980) 15

Hupp v. North Hills Lincoln-Mercury, Inc., 610 S.W.2d 349, 357 (Mo. App., W.D. 1980) 15

In re "Agent Orange" Products Liability Litigation, 506 F. Supp. 762, 787 (E.D.N.Y.), *rev'd on other grounds*,

635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 102 S. Ct. 980 (1981) 11, 13

In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, Nos. 81-4648, *et al.*, slip op. at 6 (9th Cir. June 18, 1982) 7

Joseph L. v. Office of Judicial Support, 516 F. Supp. 1345 (E.D. Pa. 1981) 11

La Buy v. Howes Leather Co., 352 U.S. 249, *reh'g denied*, 352 U.S. 1019 (1957) 12

Landau v. Chase Manhattan Bank, 367 F. Supp. 992 (S.D.N.Y. 1973) 11

McDonnell Douglas Corp. v. United States District Court, C.D. of California, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976) 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) 18

Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979) 11, 13

Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) 11, 13

Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App., D.K.C. 1978) 5, 14

Sembach v. McMahon College, Inc., 86 F.R.D. 188 (S.D. Tex. 1980) 11

Sperry Rand Corp. v. Larson, 554 F.2d 868, 872 (8th Cir. 1977) 12

Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 455 U.S. 942 (1980) 19

Walker v. City of Houston, 341 F. Supp. 1124 (S.D. Tex. 1971) 11

Wisner v. S. S. Kresge Co., 465 S.W.2d 666 (K.C. Mo. App. 1971) 15

Constitutional Provisions

United States Constitution:

Fifth Amendment 18
Seventh Amendment 17
Fourteenth Amendment 18

Missouri Constitution:

Article I, Section 22a 17

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(a)(1) 7, 8
28 U.S.C. § 1332 6
28 U.S.C. § 2283 7-8

Rules

Federal Rule of Civil Procedure 23 ..... *passim*
Federal Rule of Civil Procedure 12(b)(1) 6
Federal Rule of Civil Procedure 12(h)(3) 6
Federal Rule of Evidence 201(b) 21
Supreme Court Rule 19.5 2

Miscellaneous

K. Davis, *Administrative Law* 314 (3d ed. 1972) 21
7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1773, at 9 (1972 & Supp. 1979 at 3-4) 11

No.

In the Supreme Court of the United States

October Term, 1982

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, *et al.*,
Petitioners,

vs.

SHIRLEY STOVER,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*, conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. Petitioners request that this conditional cross-petition be granted only if this Court grants the petition in *Shirley Stover v. Melanie Hanson Johnson, Gerard Stanley Johnson, et al., and Jacqueline N. Rau*, No. 82-217 (filed August 6, 1982). Petitioners have opposed the petition in No. 82-217 for the reasons set forth in their brief in opposition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 680 F.2d 1175 and is reproduced as Appendix A to the petition in No. 82-217. The opinion

of the United States District Court for the Western District of Missouri granting class certification is reported at 93 F.R.D. 415 and is reproduced as Appendix D to the petition in No. 82-217.

JURISDICTION

The judgment of the Eighth Circuit was entered June 7, 1982. Motions for rehearing and rehearing *en banc* were denied on July 9, 1982. Shirley Stover filed a petition for writ of certiorari on August 6, 1982. The petition was served by mail on petitioners on August 6, 1982. This cross-petition is filed pursuant to Rule 19.5 of this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure is reproduced in its entirety as Appendix E to the petition in No. 82-217.

STATEMENT

On July 17, 1981, two skywalks collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, killing 114 persons and causing physical injury to approximately 220 others. The vast majority of the lawsuits arising from the skywalks collapse were filed in the Circuit Court of Jackson County, Missouri. As of August 5, 1982, 187 cases, representing the claims of approximately 200 victims, had been filed in the Missouri state court. Only eighteen cases were filed in the United States District Court for the Western District of Missouri; of these, some have been dismissed

and refiled in state court and some have been settled. Five cases presently remain on file in the District Court.

In September, 1981, both the state and the federal courts consolidated their respective cases for discovery and appointed state and federal Plaintiffs' Liaison Committees to proceed with consolidated discovery and other matters. Until the District Court's class certification order of January 25, 1982, the Plaintiffs' Liaison Committees had conducted and were proceeding with substantial discovery. Comprehensive interrogatories were served on defendants, who responded with thousands of pages of answers. In response to plaintiffs' document requests, defendants produced several hundred thousand pages of documents, which were placed in a depository jointly funded by plaintiffs and defendants. Plaintiffs' Liaison Committees also negotiated with defendants and the National Bureau of Standards for extensive testing of the skywalks debris.[1]

On September 1, 1981, Molly Riley, a victim with superficial injuries, filed a complaint in the District Court requesting that a class action of all skywalks victims be certified under Rule 23.[2] Among other things, Riley sought certification of a mandatory class under Rule 23(b)(1)(B) on the issue of defendants' liability to the class for punitive damages. The purpose of this class was to seek recovery of a single sum of punitive damages to be awarded

---

1. *See In re Skywalk Cases*, No. CV81-15244 MCF (Cir. Ct. Jackson County, Mo. Order of June 3, 1982) (Resp. A. 4a-14a). References to "Pet. A." refer to the appendices attached to the Petition for Writ of Certiorari, No. 82-217. References to "Resp. A." refer to the appendices attached to the Brief of Respondents in Opposition filed in No. 82-217.

2. Riley initially filed a class action petition in state court, *Riley v. Crown Center Redevelopment Corp., et al.*, No. CV81-16322 (Cir. Ct. Jackson County, Mo. filed July 30, 1981), but dismissed it on September 24, 1981, after her federal complaint was on file.

in favor of the class as a whole. The alleged justification for a mandatory class action was Riley's concern that the aggregate assets and liability insurance coverage of all defendants would be exhausted before all claims for actual and punitive damages were satisfied. Riley based her argument solely upon an allegation by defendant Hyatt Corporation that the total *prayers* of all lawsuits on file exceeded the $333 million in insurance coverage available to defendants.[3]

Petitioners Melanie Hanson Johnson, Gerard Stanley Johnson, and other victims of the skywalks collapse intervened in Riley's action to oppose class certification. At the December 10, 1981, hearing, opposition to class certification was overwhelming. Affidavits of 175 individual state and federal plaintiffs opposing certification of any class action were filed with the District Court. All defendants opposed class certification. Only plaintiff Riley then supported the class. Riley adduced no evidence at the hearing to show that the actual value of victims' claims exceeded or even remotely approached defendants' ability to respond to damage judgments, either through liability insurance coverage or other assets.

On January 25, 1982, the District Court certified a mandatory class action on several issues: (1) under Rule 23(b)(1)(A) on liability issues, based on a finding that individual suits would create a risk of inconsistent results; and (2) under Rule 23(b)(1)(B) on punitive damage issues—both liability and amount—based on the court's concern that the "limited fund" composed of the insurance coverage and aggregate assets of all defendants might

---

3. *See* Petition for Declaratory Judgment and Incidental Relief, *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina, et al.*, No. CV81-22009 (Cir. Ct. Jackson County, Mo., October 2, 1981), at 9.

prove insufficient to satisfy all punitive damage judgments.[4]

Also contained in the District Court's Order of January 25, 1982, is the specific language that enjoined the settlement of all skywalks-related punitive damage claims, including long-pending state court lawsuits: "Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damages issues." 93 F.R.D. at 428. (Pet. A. 60a) The District Court's intention regarding the injunctive effect of that order on the prosecution of individual state court cases, whether by trial or settlement, was reiterated in the court's subsequent, more explicit language. "Individual unnamed class members may not conduct the prosecution of any claim." Order of January 29, 1982. (Resp. A. 2a)

The practical effect of the District Court's January 25, 1982, Order was to bring the individual prosecution and settlement of both federal and state court skywalks cases to an immediate halt. Prior to the entry of that order, 122 claims, including cases in both state and federal court, had been settled for total amounts in excess of $18 million. After January 25 and for as long as the District Court's Order of January 25, 1982, remained in effect, not a single skywalks claim was settled.[5]

---

4. The District Court considered that the "fund" of resources available to defendants to respond to damage judgments might be "limited" by either or both (1) the possible insolvency of defendants (although no such evidence was adduced at the December 10, 1981, hearing); and (2) the operation of Missouri law to restrict more than a single award of punitive damages against any defendant. (Pet. A. 53a) *But see Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App., D.K.C. 1978) (rejecting under Missouri law defendant's public policy argument against multiple punitive damages liability exposure).

5. Immediately after the Eighth Circuit vacated the Order of January 25, 1982, the settlement process recommenced. In

(Continued on following page)

In its Order of January 25, 1982, the District Court denied plaintiff Molly Riley's motion for class certification on the ground that she had "failed to join certain parties who are needed for a just adjudication." (Pet. A. 42a, 61a) Instead of Riley, the District Court named four other plaintiffs, including Stover, as class representatives. (Pet. A. 43a, 44a) Immediately after the class certification was entered, it was learned that one of the named representatives had settled and two others lacked the requisite diversity of citizenship. On January 26, 1982, petitioners Johnson moved pursuant to 28 U.S.C. § 1332 and Rule 12(b)(1) and 12(h)(3) to dismiss the class action because of lack of diversity between two of the four representatives and one of the defendants. Appendix, Petition for Mandamus, Exhibit 18. On January 27, 1982, the District Court ruled that petitioners' motion to dismiss was improperly filed because petitioners did not have standing to raise lack of subject matter jurisdiction. Appendix, Petition for Mandamus, Exhibit 20.

On January 27, 1982, petitioners Johnson filed notices for the deposition of Stover, the only named diverse representative who had not settled, and her counsel, who had been appointed assistant class counsel. Appendix, Petition for Mandamus, Exhibits 22 and 23. On January 29, 1982, upon its own motion and without notice, the District Court quashed petitioners' deposition notices for Stover and her counsel. In this Order, the court also ruled:

> Individual unnamed class members may not conduct the prosecution of any claim. The class is

---

Footnote continued—

the period from June 7 to August 5, 1982, 47 additional claims were settled for nearly $5.5 million. As of August 5, 1982, a total of 169 claims had been settled for more than $24 million.

> represented by class counsel who are responsible for the conduct of all claims of the class. No matters may be presented to this Court which concerns [sic] a member of the class unless it is [sic] presented by the counsel designated to handle the class action. *The Clerk of the Court has been directed to reject any matters that are not being filed by counsel for the class or counsel for defendants.*

(Resp. A. 2-3a) (Emphasis supplied.)

Petitioners challenged both the class certification and the injunctive aspects of the District Court's Order of January 25, 1982. Melanie Hanson Johnson, Gerard Stanley Johnson, and others filed a petition for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit requesting that the class certification be set aside on numerous grounds.[6] Pursuant to 28 U.S.C. § 1292(a)(1), Jacqueline N. Rau appealed the District Court's injunction against the settlement or other prosecution of her state court action. She contended, among other things, that the injunction violated the Anti-Injunction Act, 28

---

6. The petition for a writ of mandamus filed by petitioners Johnson argued that the class certified by the District Court was inherently defective because its primary function was to obtain a single, class-wide award of punitive damages. Issues raised but not reached by the Eighth Circuit included the following: (1) the District Court's erroneous application of Rule 23(b)(1)(A) to a group of tort claims for unliquidated money damages; (2) the absence of a sufficient factual record to justify a finding that a "limited fund" exists (*see In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, Nos. 81-4648, *et al.*, slip op. at 6 (9th Cir. June 18, 1982)); (3) the District Court's misinterpretation of Missouri law regarding multiple awards of punitive damages against a single defendant; (4) the "fluid recovery" nature of the District Court's proposed remedy which is not authorized under Rule 23; and (5) the legal impossibility of awarding and dividing a single amount of punitive damages awarded to the class as a whole without violating defendants' constitutional due process rights and plaintiffs' constitutional rights to trial by jury.

U.S.C. § 2283. In the alternative, Rau sought a writ of mandamus, requesting the same relief as petitioners Johnson, *et al.* The petition for mandamus and the appeal were consolidated by the Eighth Circuit.

On June 7, 1982, the Eighth Circuit vacated the District Court's Order of January 25, 1982. The Court of Appeals held that the *specific language* of the District Court's Order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1). "In the present case, contrary to the class's assertion, the District Court *expressly prohibited* class members from settling their punitive damage claims . . . ." 680 F.2d at 1180 (Pet. A. 9a) (emphasis added).[7] The court further held that this injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, by enjoining the prosecution or settlement of pending state court litigation. The Eighth Circuit did not address the Rule 23 and due process issues raised by petitioners Johnson, *et al.*

Rehearing and rehearing *en banc* were denied without comment on July 9, 1982.

REASONS FOR GRANTING THE PETITION

If the Court grants the petition in No. 82-217, it should also grant this conditional cross-petition in order to provide the District Court, the Eighth Circuit, the defendants, and the victims with a final decision on the propriety of a Rule 23(b)(1) class action for the skywalks litigation. In their Petition for Mandamus, petitioners Johnson, *et al.*, requested the Eighth Circuit to vacate the District

---

7. Judge Heaney's dissent did not disagree with the majority's conclusion that the language in the District Court's January 25, 1982 Order was an injunction. 680 F.2d at 1185 n.1, 1192 n.16. (Pet. A. 19a n.1, 34a n.16)

Court's Order of January 25, 1982, because (1) the order applied Rule 23(b)(1) improperly, and (2) the District Court denied petitioners due process of law when it prevented them from conducting discovery and presenting evidence on Stover's adequacy as class representative. Because the Eighth Circuit vacated the Order of January 25, 1982, on the ground that it violated the Anti-Injunction Act, the court did not address the Rule 23(b)(1) and due process issues raised by petitioners. A decision on the questions presented by this cross-petition will resolve important issues under Rule 23(b)(1), conserve the resources of the courts and parties, and assure the rapid and efficient disposition of the skywalks litigation.

First, if this Court sustains the Eighth Circuit decision vacating the District Court's January 25, 1982, Order because it improperly enjoined cases previously filed in state court, whether a Rule 23(b)(1) class may be certified for those victims who had not filed in state court before the entry of the order will still remain an issue. Counsel for Stover already have requested the District Court to certify such a Rule 23(b)(1) class. Certification of a Rule 23(b)(1) class composed only of those claimants who had not filed in state court before January 25, 1982, again would raise all the basic issues of the propriety of a mandatory class for the skywalks litigation. Litigating the Rule 23(b)(1) issues before the District Court, the Eighth Circuit, and ultimately this Court would be a burden for both the courts and the parties. This burden may be avoided by granting the cross-petition.

Second, if this Court reverses the Eighth Circuit on the ground that the District Court's Order of January 25, 1982, did not violate the Anti-Injunction Act, the underlying issue of the propriety of the class under Rule 23(b)

(i) will remain undecided. This issue will have to be decided by the Eighth Circuit and undoubtedly once again will be brought before this Court. This expenditure of appellate court resources may be avoided by granting this cross-petition.

Third, the issue of the propriety of applying Rule 23(b)(1) to mass accidents is important to both the skywalks victims and future victims of mass accidents. Mass accidents, such as plane crashes and the skywalks collapse, are an all too frequent event in modern society. As occurred with the skywalks collapse, the lives of hundreds of people are affected by the tragedy. How the federal judicial system responds to the inevitable litigation arising out of mass accidents ultimately must be decided by this Court. Granting this cross-petition will permit this Court to address the important procedural and policy issues related to the propriety of a Rule 23(b)(1) class for mass accidents.

ARGUMENT

I. THE DISTRICT COURT'S CERTIFICATION OF A RULE 23(b)(1)(A) CLASS ON THE ISSUE OF LIABILITY FOR COMPENSATORY AND PUNITIVE DAMAGES IS IMPROPER.

A. Rule 23(b)(1)(A) Does Not Apply to Tort Actions for Compensatory and Punitive Damages Where There Is No Risk of Exposing Defendants to Conflicting and Mutually Incompatible Standards of Conduct.

Rule 23(b)(1)(A) is designed to eliminate the dilemma that would confront the party opposing a class if judgments imposing conflicting and mutually incom-

patible standards of conduct are entered against it. *Sembach v. McMahon College, Inc.*, 86 F.R.D. 188 (S.D. Tex. 1980). *See* Rule 23, Note of Advisory Committee on Rules, 39 F.R.D. at 100. Rule 23(b)(1)(A) is not and never has been intended to apply to a situation in which there is merely a possibility that a defendant might have to pay damages to some plaintiffs but not to others.[8]

In the skywalks litigation, no defendant faces any risk of being required to violate the terms of one judgment because of compliance with another. The individual skywalks defendants may pay damages in some actions and escape unscathed in others, but in either case, each defendant will be able to act consistently with all judgments that are entered.

B. The District Court's Certification of a Rule 23(b)(1)(A) Class for Compensatory and Punitive Liability Is Improper.

The District Court's certification of a Rule 23(b)(1)(A) class for compensatory and punitive liability is erroneous. The District Court's action went beyond the scope

---

8. *See, e.g., Esler v. Northrup Corp.*, 86 F.R.D. 20 (W.D. Mo. 1979); *Chmieleski v. City Products Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976); *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992 (S.D.N.Y. 1973); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979); *Walker v. City of Houston*, 341 F. Supp. 1124 (S.D. Tex. 1971); *Sembach v. McMahon College, Inc.*, 86 F.R.D. 188 (S.D. Tex. 1980); *Joseph L. v. Office of Judicial Support*, 516 F. Supp. 1345 (E.D. Pa. 1981); *In re "Agent Orange" Products Liability Litigation*, 506 F. Supp. 762, 787 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 102 S. Ct. 980 (1981); *McDonnell Douglas Corp. v. United States District Court, C.D. of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas Corp.*, 425 U.S. 911 (1976); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1773, at 9 (1972 & Supp. 1979 at 3-4).

of Federal Rule of Civil Procedure 23 and should have been corrected by the Eighth Circuit. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, *reh'g denied*, 352 U.S. 1019 (1957); *accord*, *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 872 (8th Cir. 1977).

II. THE DISTRICT COURT'S CERTIFICATION OF A RULE 23(b)(1)(B) CLASS ON THE ISSUES OF LIABILITY FOR AND THE AMOUNT OF PUNITIVE DAMAGES IS WITHOUT JUSTIFICATION AND IS A MISAPPLICATION OF RULE 23(b)(1)(B).

Rule 23(b)(1)(B) provides that a class action may be maintained when the prosecution of individual actions would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members . . . ." The District Court determined that a 23(b)(1)(B) class was appropriate because (1) there was the *possibility* of a limited fund for punitive damages and individual class members faced a risk that a single plaintiff would take it all, and (2) there was some uncertainty under Missouri law as to whether a single defendant could be liable for more than one award of punitive damages. Petitioners submit that the mere possibility of a limited fund for punitive damages is not a sufficient basis upon which to base a Rule 23(b)(1)(B) class; Missouri law does not prohibit multiple awards of punitive damages for a single wrongful act or course of conduct; and, the lump sum award and subsequent division of punitive damages would violate Missouri law and the constitutional rights of every class member.

A. The Mere Possibility of a Limited Fund for Punitive Damages Is Not Sufficient to Invoke the Provisions of Rule 23(b)(1)(B).

To justify certification of a Rule 23(b)(1)(B) class based on a claim that there are insufficient resources available to defendants to respond to all claims for punitive damages, the District Court must establish a *factual basis* that such a "limited fund" exists. For example, a "limited fund" class *cannot* be justified merely upon the aggregate prayers for damages in plaintiffs' complaints. *In re "Agent Orange" Products Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 102 S. Ct. 980 (1981); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979); *Esler v. Northrup Corp.*, 86 F.R.D. 20 (W.D. Mo. 1979); *George v. United Savings & Loan Association*, 63 F.R.D. 631 (N.D. Ga. 1974). The Court must analyze the *actual value* of claims asserted against defendants, not the routinely overstated damage prayers. *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543, *cert. dismissed*, 443 U.S. 913 (1979).

An analysis of the *realistic value* of claims asserted in the skywalks litigation should have been performed by the District Court to determine whether there was a factual basis to conclude there were insufficient resources available to defendants to respond to legitimate punitive damage claims against them. No such analysis was undertaken by the District Court. Instead, the District Court merely stated, "At the present time, the funds available to pay for punitive damages appears [sic] to be limited." 93 F.R.D. 415, 424 (Pet. A. 53a).

B. Missouri Law Permits Multiple Awards of Punitive Damages for a Single Wrongful Act or Course of Conduct.

In *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App., D.K.C. 1978), a products liability case, defendant argued that imposition of punitive damages for a design defect was inappropriate because of the potential for multiple awards of punitive damages arising from a single allegedly wrongful act. The Court of Appeals rejected, on public policy grounds, Ford's contention that punitive damages should not be permitted in a design defect case because of the exposure to multiple punitive damage liability. The court indicated that Missouri law provides for the control of excessive punitive damages:

> Means are available to both trial and appellate courts of the state for the control of excessive awards of punitive damages. See *Beggs v. Universal C.I.T. Credit Corporation*, 409 S.W.2d 719, 724-25[8-13] (Mo. 1966).

567 S.W.2d at 669. The citation to *Beggs* is a specific reference to remittitur.

The District Court has a duty to apply the substantive law of Missouri as enunciated in *Rinker*. The mere possibility that Missouri may later change its position on this issue is insufficient to support a Rule 23(b)(1)(B) class action on punitive damages.

C. Missouri Law Does Not Permit the Award of Punitive Damages As a Lump Sum in Favor of a Class.

The *jury* in a punitive damages case makes three determinations: (1) whether punitive damages will be

awarded, (2) what amount will properly punish each defendant, and (3) how this amount should be divided among plaintiffs, if multiple plaintiffs are involved. *See Wisner v. S. S. Kresge Co.*, 465 S.W.2d 666 (K.C. Mo. App. 1971); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970). The award of punitive damages "is peculiarly a function of the jury." *Holcroft v. Missouri-Kansas-Texas Railway Co.*, 607 S.W.2d 158 (Mo. App., W.D. 1980). The trial court's *sole* duty is to determine as a matter of law whether the facts warrant an award of punitive damages. *Bukovac v. Lloyd Ketcham Oldsmobile, Inc.*, 579 S.W.2d 790 (Mo. App., W.D. 1979).

Under Missouri law, a jury cannot award a lump sum of punitive damages in favor of a "class as a whole." An award of punitive damages must be based on the jury's individualized assessment of the facts of each plaintiff's particular case. The amount of punitive damages "must be assessed by a jury in the light of the particular circumstances of the particular case." *Hupp v. North Hills Lincoln-Mercury, Inc.*, 610 S.W.2d 349, 357 (Mo. App., W.D. 1980). The District Court's proposal of a lump sum award in favor of a class could not possibly include an individual assessment for each plaintiff and, therefore, is contrary to Missouri law.

D. A Class-Wide Award of Punitive Damages Cannot Constitutionally Be Divided Among Class Members.

The ultimate division and distribution of an award of punitive damages in favor of the "class as a whole" is a question that should have been addressed by the District Court before it decided to certify a Rule 23(b)(1)(B) class. There are two obvious, and insurmountable, problems to such a distribution:

(1) A lump sum award of punitive damages in favor of the "class as a whole" is a "fluid recovery" not contemplated under Rule 23.

(2) Division of such a lump sum damage award, *no matter what formula or method of calculation is used*, would deprive each class member of his constitutional right to a trial by jury on the issue of punitive damages.

1. Rule 23 Does Not Permit "Fluid Recovery."

The issue of a "fluid recovery" (the improper lumping together of a group of separate damage claims in a single recovery to be later divided by some unnamed mechanism) in favor of the "class as a whole" is not one of first impression; it has been previously litigated and was firmly rejected. *Eisen v. Carlisle and Jacquelin*, 479 F.2d 1005 (2d Cir. 1972), *vacated with instruction to dismiss class as defined*, 417 U.S. 156 (1974).

In *Eisen*, the Second Circuit *rejected* the concept of "fluid recovery" in favor of the "class as a whole" as an attempted solution to the manageability problems of the plaintiff's proposed class. It also is important to note that the *Eisen* court considered the constitutional problems of such a plan. Its conclusion was that even if a fliud recovery scheme in favor of the "class as a whole" was permissible under Rule 23, such a plan would be unconstitutional as a violation of the defendants' due process rights.

2. Division of a Class-Wide Lump Sum Punitive Damages Award Would Violate Each Claimant's Constitutional Right to a Trial by Jury.

The District Court's order did not discuss how a class-wide fund of punitive damages would be divided among class members. One can assume, however, that one of two alternative procedures would be implemented. The division of a lump sum punitive damage recovery would be effected either by a per capita distribution, in which each class member would receive an equal share of the class-wide award, or a pro rata division in proportion to the compensatory damages proven by each class member.

Whatever the formula for division of a class-wide award of punitive damages among class members, *any* such plan constitutes a denial of each claimant's right to trial by jury on the issue of punitive damages in violation of the Seventh Amendment to the United States Constitution and Article I, Section 22(a) of the Missouri Constitution. *Any* judicial determination of each claimant's proportional right to a class-wide damages award, whether by a fixed formula or an equal per capita distribution, violates each claimant's right to have the issue of the amount of punitive damages, if any, to be awarded to him decided by a jury, as guaranteed by the United States and Missouri Constitutions.

III. THE DISTRICT COURT'S ORDERS OF JANUARY 25 AND 29, 1982, ARE A VIOLATION OF THE RIGHTS OF CLASS MEMBERS TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THEY PRECLUDE CLASS MEMBERS FROM BEING HEARD ON THE PROPRIETY OF THE CLASS PROCEEDING.

A. The District Court's *Ex Parte* Proceedings and Its Orders Deny Petitioners the Opportunity to Be Heard on Fundamental Class Action Issues.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections.*" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis supplied). Notice and the opportunity to be heard are the core of the due process rights guaranteed to all persons under the Fifth and Fourteenth Amendments to the Constitution. The District Court's Order of January 29, 1982, foreclosed the only means presently available to class members to challenge that very representation, as well as the underlying propriety of the class certification itself.

The District Court's Orders of January 25, and 29, 1982, deprived involuntary class members of their opportunity to be heard in three ways. First, in designating

plaintiff Stover as a class representative and selecting class counsel on its own motion, the District Court acted without affording any parties a prior right to be heard on those determinations. Since no party to any of the skywalks cases (except plaintiff Stover) knew of the District Court's planned action in rejecting Riley and designating a new class representative, no party had an opportunity to develop and present evidence that would aid the District Court in making its determination. Potential members of a proposed class, particularly one which does not permit members to opt out, have strong interests in the action long *before* any decision is made whether a class action is appropriate.

> Courts have consistently recognized that the unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf. Thus, potential class members are given the opportunity *to support or to challenge the adequacy of representation by the named plaintiff.*

Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 455 U.S. 942 (1980) (emphasis supplied).

Rule 23 itself contemplates intervention by unnamed members of a class. The District Court is empowered by Rule 23(d) to require that notice be sent to absent class members that they may intervene "or otherwise . . . come into the action." Such notice is to be provided "for the protection of the members of the class or otherwise for the fair conduct of the action," so that absent class members can have the opportunity *to be present* and *to protect their interests* at any critical stage of the proceedings.

B. The Court Denied Petitioners Due Process by Denying Them the Opportunity to Be Heard After Its Order Certifying the Class.

The District Court's second violation of the due process rights of involuntary class members came when it further compounded its first error by denying class members any means to challenge its decision after it was made. On matters as crucial to the heart of the class proceeding as the adequacy of the District Court's chosen representative, the adequacy of counsel chosen by the District Court to represent the class, the definition of the class, possible conflicts of interest within the class, and the effect of class certification on settlement, the involuntary class members were silenced.

C. The Court Denied Petitioners Due Process by Its Inadequate and Improper Findings of Fact on Fundamental Class Action Issues.

The third fatal flaw in the class certification, which reveals why the opportunity to be heard is indispensable, is that the District Court's Order of January 25, 1982, is based on matters dehors the record. It is fundamental that "the decision-maker's [sic] conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing (citations omitted). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for its determination and indicate the evidence he relied on . . ." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The District Court's "findings" concerning the adequacy of representation to be supplied by plaintiff Stover are conclusory at best. Nowhere did the District Court indicate the evidence on which it relied in making its determination. The reason for this failure

is that there is absolutely nothing in the record on these matters. If the District Court had any information on this subject, it was the result of *ex parte* communications.

There is some language in the District Court's Order of January 25, 1982, that may indicate that it was taking judicial notice of the qualities of plaintiff Stover and her counsel, although the subsequent appointment of other counsel on February 1, 1982, was not even accompanied by that suggestion. If this is what the District Court intended, its errors remain. Federal Rule of Evidence 201 (b) specifically states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Clearly, the ability of a Houston-based attorney (Mr. Collins) to adequately represent the members of the class or of an individual Iowa plaintiff (Stover) to make available adequate resources for the prosecution of a class is not something that can be determined by judicial notice. Additionally, judicial notice is not appropriate when the facts in question are critical to the proceeding at hand. "[C]onvenience should always yield to the requirement of procedural fairness that parties should have an opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." K. Davis, *Administrative Law* 314 (3d ed. 1972). The disposition of the certification phase of the skywalks litigation revolves around these adequacy issues, and due process thus requires an opportunity to be heard. Moreover, even assuming *arguendo*

that judicial notice could be taken of such crucial issues, Rule 201(e) itself provides:

> A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice in the tenor of the matter noticed. In the absence of prior notification, *the request may be made after judicial notice has been taken.*

(Emphasis supplied.) By the District Court's own admission, there was no prior notification that plaintiff Stover and her counsel would be named as class representatives and class counsel, respectively, and the District Court's Order of January 29, 1982, precluded counsel for any unnamed class member from filing any pleadings with the United States District Court for the Western District of Missouri.

CONCLUSION

If review is granted in No. 82-217, this cross-petition should also be granted.

Respectfully submitted,

PATRICK MCLARNEY
(Counsel of Record)
DAVID R. MORRIS
ELWOOD L. THOMAS
ANDREW SEE
JOHN F. MURPHY
TIMOTHY J. KENNEDY
SHOOK, HARDY & BACON
20th Floor, Mercantile Tower
1101 Walnut Street
Kansas City, Missouri 64106
816/474-6550

JOHN E. SHAMBERG
LYNN R. JOHNSON
SCHNIDER, SHAMBERG & MAY
Merriam Oaks Building
8500 West 63rd, Suite 210
Shawnee Mission, Kansas 66204
913/384-0100

MAX W. FOUST
MORRIS & FOUST
2390 City Center Square
12th and Baltimore
P. O. Box 26490
Kansas City, Missouri 64196
816/474-6050

DUKE W. PONICK, JR.
1850 City Center Square
1100 Main Street
P. O. Box 26035
Kansas City, Missouri 64196
816/221-5228

Attorneys for Petitioners
Melanie Hanson Johnson and
Gerard Stanley Johnson, et al.

September, 1982